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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

TAYLOR PATTERSON,

Plaintiff and Appellant,

v.

DOMINO'S PIZZA, LLC et al.,

Defendants and Respondents.

2d Civil No. B235099
(Super. Ct. No. 56-2009-00347668-CU-OE-SIM)
(Ventura County)

Plaintiff Taylor Patterson appeals a summary judgment granted in favor of defendants Domino's Pizza, LLC, Domino's Pizza, Inc., and Domino's Pizza Franchising, LLC (hereafter Domino's) on her employment sexual harassment action. (Gov. Code, § 12940 [FEHA].) Domino's had a franchise agreement with defendant Sui Juris, LLC, dba Domino's Pizza (hereafter Sui Juris), a franchisee of the Domino's pizza chain. Patterson, a Sui Juris employee, alleged that her manager at the pizza restaurant sexually harassed and assaulted her on the job. She claimed that Domino's, the franchisor of the pizza chain, was subject to vicarious liability because of its extensive control over Sui Juris, the franchisee.

We conclude, among other things, that: 1) the trial court erred by granting summary judgment, and 2) Patterson met her burden to show triable issues of fact as to whether Domino's exercised sufficient control over Sui Juris's operations and its employees to subject Domino's to potential vicarious liability. We reverse.

FACTS

Patterson was a teenage employee of Sui Juris, a Domino's pizza franchisee. Renee Miranda was the assistant manager of that restaurant. Patterson claimed Miranda had sexually harassed and assaulted her at work.

Patterson filed an action against Miranda, Sui Juris, and the franchisor Domino's, alleging causes of action for sexual harassment in violation of FEHA (Gov. Code, § 12940), failure to prevent discrimination, retaliation for exercise of rights, infliction of emotional distress, assault, battery and constructive wrongful termination. She claimed Sui Juris and Domino's were Miranda's employers and were vicariously liable for his actions under the doctrine of respondeat superior.

Domino's answered the complaint and filed a cross-complaint against Miranda seeking "indemnity" and "apportionment of fault." Sui Juris filed for Chapter 7 bankruptcy relief.

In his deposition, Daniel Poff, the Sui Juris owner, testified that Claudia Lee, a Domino's area leader, told him to fire Miranda. He said he had to comply with the instructions of the Domino's area leaders because "[i]f you didn't, you were out of business very quickly." He said Lee also told him to fire another employee because of his performance in handling bags. Poff had no choice; he had to follow Lee's instructions and fire that employee. His operation was monitored by the Domino's inspectors, and their decisions determined whether he could maintain his franchise.

Domino's filed a motion for summary judgment claiming that: 1) Sui Juris was an independent contractor pursuant to the terms of a written franchise agreement, and 2) there was no principal agency relationship between Sui Juris and Domino's. The notice of motion indicated that summary judgment on all causes of action was based on the ground that "DOMINO'S was not PATTERSON'S employer and was not involved in the training, supervision or hiring of any employees of Defendant SUI JURIS."

Patterson opposed the motion and attached, among other things, Poff"s deposition. She claimed Domino's exercised substantial control over Sui Juris and consequently there were triable issues of fact relating to Domino's liability.

The trial court granted summary judgment. It noted that the franchise agreement between Domino's and Sui Juris provided that Sui Juris was responsible for "supervising and paying the persons who work in the Store." It ruled there was no triable issue of fact because Domino's had no role with respect to Sui Juris's employment decisions. The court also found that even if Domino's is considered to be the employer, Patterson could not prevail on the remaining issues in her action. It entered judgment dismissing all of her causes of action.

DISCUSSION

Domino's Control over Sui Juris

Patterson contends the trial court erred by granting summary judgment. She claims she met her burden to establish a triable issue of fact as to whether Domino's had sufficient control over Sui Juris's operations and employees so as to be subject to potential vicarious liability for Miranda's actions. We agree.

"'We review a summary judgment motion de novo to determine whether there is a triable issue as to any material fact . . . .'" (*Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 436.) "'We are not bound by the trial court's stated reasons or rationales.'" (*Ibid.*) ""'In practical effect, we assume the role of a trial court . . . .'"" (*Ibid.*) "'Summary judgment is a drastic remedy to be used sparingly, and any doubts about the propriety of summary judgment must be resolved in favor of the opposing party.'" (*Ibid.*)

The trial court found that Sui Juris was an independent contractor and that Miranda was "not an employee or agent of . . . Domino's . . . for purposes of imposing vicarious liability."

Whether a franchisor is vicariously liable for injuries to a franchisee's employee depends on the nature of the franchise relationship. "[A] franchisee may be deemed to be the agent of the franchisor." (*Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 547.) "The general rule is where a franchise agreement gives the franchisor the right to complete or substantial control over the franchisee, an agency relationship exists." (*Cislaw v. Southland Corp.* (1992) 4 Cal.App.4th 1284, 1288.) "'[I]t is

the right to control the *means and manner* in which the result is achieved that is significant in determining whether a principal-agency relationship exists.'" (*Ibid.*) Consequently, a franchisee may be found to be an agent of the franchisor even where the franchise agreement states it is an independent contractor. (*Kuchta,* at p. 548.) If the franchisor has substantial control over the local operations of the franchisee, it may potentially face liability for the actions of the franchisee's employees. (*Nichols v. Arthur Murray, Inc.* (1967) 248 Cal.App.2d 610.)

"[T]he franchisor's interest in the reputation of its entire system allows it to exercise certain controls over the enterprise without running the risk of transforming its independent contractor franchisee into an agent." (*Cislaw v. Southland Corp., supra*, 4 Cal.App.4th at p. 1292.) Consequently, it may control its trademarks, products and the quality of its services. But the franchisor may be subject to vicarious liability where it assumes substantial control over the franchisee's local operation, its management-employee relations or employee discipline. (*Id*. at p. 1296; *Kuchta v. Allied Builders Corp., supra*, 21 Cal.App.3d at p. 547; *Nichols v. Arthur Murray, Inc*., *supra*, 248 Cal.App.2d at p. 615.)

The Franchise Agreement

Domino's contends the franchise agreement gave Sui Juris complete control over its employees. The agreement provides, in relevant part, that Sui Juris "shall be solely responsible for recruiting, hiring, training, scheduling for work, supervising and paying the persons who work in the Store and those persons shall be your employees, and not [Domino's] agents or employees." Domino's claims this provision, as a matter of law, removes its control over franchisee-employee matters.

Patterson contends the language relied on by Domino's is limited or qualified by other provisions of the agreement that vest substantial control in Domino's. She is correct. The agreement provides that Domino's sets both the "qualifications" for the franchisee's employees and the standards for their "demeanor." Franchisee employees may not operate a store without first disclosing their identities to Domino's. A violation of this provision may result in termination of the franchise. The franchisee is required to install a

"PULSE," or another computer system designated by Domino's, for training employees. The type of training is determined by Domino's.

The Domino's Manager's Reference Guide (MRG) describes the specific employment hiring requirements for all "personnel involved in product delivery" and it describes the documents that must be included in their personnel files. It requires all employees to submit "[t]ime cards and daily time reports." It specifies standards for employee hair, facial hair, "[d]yed hair," jewelry, tattoos, fingernails, nail polish, shoes, socks, jackets, belts, gloves, watches, hats, skirts, visors, body piercings, earrings, necklaces, wedding rings, "[t]ongue rings," "clear tongue" retainers, and undershirts.

Domino's claims the franchise agreement grants Sui Juris the freedom to conduct its own independent business. But provisions of the agreement substantially limit franchisee independence in areas that go beyond food preparation standards. The franchisee's computer system is not within its exclusive control. Domino's has "independent access" to its data. Domino's has the right to audit the franchisee's tax returns and financial statements. (*Kuchta v. Allied Builders Corp.*, *supra*, 21 Cal.App.3d at p. 547 [franchisor's right to audit franchisee's books is a factor supporting a finding of agency].) Domino's also determines the franchisee's store hours, its advertising, the handling of customer complaints, signage, the e-mail capabilities, the equipment, the furniture, the fixtures, the décor, and the "method and manner of payment" by customers. Domino's regulates the pricing of items at the counter and home delivery, and it sets the standards for liability insurance. A franchisee's liability insurance policies must name Domino's as "additional insureds."

Domino's also decides the type of bookkeeping and record keeping the franchisee may use. Sui Juris's location and its right to re-locate are determined by Domino's, which also has the right to send inspectors to monitor this franchisee. (*Kuchta v. Allied Builders Corp.*, *supra*, 21 Cal.App.3d at p. 547 [franchisor's "right to control the location of the franchisee's place of business" and the right to send inspectors are factors supporting a finding that the franchisee is an agent].) Domino's also controls whether the franchisee may "engage, or own any interest, in any other business activity" or "be

employed by any other business." It requires franchisees to report "weekly" on sales, and to provide Domino's with their state and local business tax returns "for any period" and "such other information as [Domino's] may reasonably require . . . ."

The Domino's MRG specifies the standards a franchisee is expected to maintain as "minimum guidelines for the operation of all Domino's Pizza stores . . . ." These include requirements in a variety of areas, such as bank deposits, safes, "front till" cash limits, the type of credit cards that must be accepted, mobile phone use, store closing procedures, store records, refuse removal, radar detectors, phone caller identification requirements, security, delivery staffing, holiday closings, stereos, tape decks, wall displays, franchisee web sites, "in-store conversations," and literature that is "allowed in a store." (*Miller v. McDonald's Corp.* (Or.Ct.App. 1997) 945 P.2d 1107, 1111 [manual describing how "the franchisee was to carry out its responsibilities in considerable detail" supported claim of agency]; see also *Parker v. Domino's Pizza Inc*, (Fla.Ct.App. 1993) 629 So.2d 1026, 1029 ["manual which Domino's provides to its franchisees is a veritable bible for overseeing a Domino's operation"].)

The provisions and specific franchisee requirements discussed above raise reasonable inferences supporting Patterson's claim that Sui Juris is not an independent contractor. (*Kuchta v. Allied Builders Corp.*, *supra*, 21 Cal.App.3d at p. 547; see also *Parker v. Domino's Pizza, Inc.*, *supra*, 629 So.2d at p. 1029 [triable issue of fact whether Domino's franchisee was an independent contractor as stated in the franchise agreement because other provisions in the agreement gave Domino's control over "every conceivable facet of the business"]; see also *Font v. Stanley Steemer International, Inc*. (Fla.Ct.App. 2003) 849 So.2d 1214, 1219 [Domino's and other franchisors use franchise agreements with provisions stating franchisees are independent contractors, but "other contractual provisions" may "reflect otherwise"].) But even if Domino's is correct in its interpretation of the franchise agreement, that document is not the only evidence we consider. (*Wickham v. Southland Corp.* (1985) 168 Cal.App.3d 49, 59.)

Other Evidence of Control

Domino's cites cases from courts in other jurisdictions that have suggested that the language of the franchise agreement is dispositive on control. But California courts have concluded that the provisions of the agreement are relevant, but not the exclusive evidence of the relationship. (*Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1716 [some franchise agreements have unenforceable "one-sided" provisions purporting to place "all the obligations on the franchisee"].) Consequently, "the provisions of franchise agreements are not necessarily controlling." (*Wickham v. Southland Corp.*, *supra*, 168 Cal.App.3d at p. 59.) Instead, we look to the totality of the circumstances to determine who actually exercises the ultimate control. (*Kuchta v. Allied Builders Corp.*, *supra*, 21 Cal.App.3d at p. 547 ["the question of whether the franchisee is an independent contractor or an agent is ordinarily one of fact"].)

Domino's suggests that the evidence shows: 1) Sui Juris made all the decisions regarding the employees of that franchise, 2) Domino's assumed no role and exercised no actual control over employee discipline, and 3) Poff, the owner of Sui Juris, made his own voluntary decision to terminate Miranda.

Patterson responds that she presented evidence supporting reasonable inferences that, notwithstanding the provisions of the franchise agreement: 1) Domino's exercised extensive local management control over Sui Juris, 2) it had control over employee conduct and discipline, 3) a Domino's area leader was deciding which Sui Juris employees should be fired, 4) Domino's ordered Poff to terminate Miranda, and 5) Poff complied as he had no choice given the extensive control Domino's exercised over his franchise. Patterson claims there are triable issues of fact about the extent of Domino's control. She is correct.

At his deposition, Poff indicated that the control over his Sui Juris franchise was subject to the orders he received from Domino's. He said when he "signed with Domino's, . . . [he] was told, in no uncertain terms, that if [he] did not play ball the way they wanted [him] to play ball, that [his franchise] would be in jeopardy." Poff said he had

no control about the food supplies he could purchase for his store. Domino's made those determinations, with an exception for Coca-Cola products.

Poff said Domino's provided guidelines about the employees he could hire. They had to "look and act a certain way," and he implemented those policies when he hired applicants. Domino's guidelines also included policies on employee "attendance" and sexual harassment. Poff"s testimony suggests that Domino's oversight of his franchise was extensive. Domino's sent inspectors to verify compliance. They also "called the store on the sly" and used "mystery shoppers" to determine whether Sui Juris was following its procedures. Poff said, "I was getting ticky-tacked to death by inspectors. . . . [T]he way they changed the operating agreement made it easier for them to put you out of business by how they could write you up and how they graded their inspections."

Poff said he was also under the direction of Domino's area leader Claudia Lee. He indicated that Lee was telling him which employees of his franchise should be terminated and he had no choice but to comply. He said Lee told him to fire one Sui Juris employee who was not following procedures relating to the use of bags. He said, "I had to pull the trigger on the termination, [and] it was very strongly hinted that there would be problems if I did not do so. [The Domino's] area leaders would pull you into your office . . . and tell you what they wanted. If they did not get what they wanted, they would say you would be in trouble. . . . I never said 'no' intentionally to an area leader."

Lee told Poff to terminate Miranda. She said, "'You've got to get rid of this guy.'" She instructed him to "re-train" his employees. Poff said he had to follow directions of the Domino's area leaders. He said, "If you didn't, you were out of business very quickly."

Domino's points to other evidence. But in reviewing a summary judgment, we do not resolve factual disputes. We must "'view the evidence in the light most favorable to the opposing party [i.e., the plaintiff] and accept all inferences reasonably drawn therefrom.'" (*Suarez v. Pacific Northstar Mechanical, Inc., supra,* 180 Cal.App.4th at p. 436.) Poff's testimony, if believed by a trier of fact, supported reasonable inferences that there was a lack of local franchisee management independence. Patterson met her

burden to show triable issues of fact involving the extent of Domino's control over Sui Juris.

Other Issues

Domino's claims that even if Patterson prevails on the issue of control, we should affirm the judgment. It notes that the trial court went beyond the control issue, reached all the remaining issues in the case, and concluded that even if Domino's was the employer, Patterson could not prevail on any of her causes of action.

But in reaching these additional issues to grant summary judgment, the trial court erred. The Domino's notice of motion indicated that the single ground for summary judgment on all causes of action was the issue of the control Domino's had over Sui Juris's employees.

"It is elemental that a notice of motion must state in writing the 'grounds upon which it will be made.'" (*Gonzales v. Superior Court* (1987) 189 Cal.App.3d 1542, 1545.) "Only the grounds specified in the notice of motion may be considered by the trial court." (*Ibid*.; Cal. Rules of Court, rule 3.1110(a).) In her opposition, Patterson properly objected to the court's consideration of issues not included in Domino's notice of motion in deciding summary judgment. (Cal. Rules of Court, rule 3.1110(a); *Hernandez v. National Dairy Products Co.* (1954) 126 Cal.App.2d 490, 493.)

But even had Domino's included the remaining issues in its notice of motion, reversal is still required. The trial court found that even if Domino's is considered the employer, there were no triable issues of fact showing it had notice of, had ratified, or had condoned Miranda's conduct. It ruled that there were no facts showing prior incidents of sexual harassment at the restaurant. It concluded Patterson could not prevail. These issues are relevant where an employee claims harassment by another employee.

But a different standard applies where the harasser is the employee's supervisor. (*Dee v. Vintage Petroleum, Inc*. (2003) 106 Cal.App.4th 30, 36.) The trial court found that Miranda was the restaurant "manager." Consequently, he was not merely another coworker. Patterson was a 16-year-old employee, a minor, subject to his control and supervision on the job.

The trial court erred by applying a negligence standard. It did not consider the issue of the employer's strict liability for a supervisor's sexual harassment of a child employee. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042.) As stated by our Supreme Court, "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor." (*Ibid.*) Domino's did not present sufficient facts in its motion to show its entitlement to summary judgment based on a claim involving a supervisor's sexual harassment of an employee. (See *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [discussing the strong evidentiary burden the employer must meet to obtain summary judgment on this issue].)

A single sexually offensive act by one employee against another usually is not sufficient to establish employer liability. (*Dee v. Vintage Petroleum, Inc.*, *supra*, 106 Cal.App.4th at p. 36.) But "where the act is committed by a supervisor, the result may be different." (*Ibid.*) "'Because the employer cloaks the supervisor with authority, we ordinarily attribute the supervisor's conduct directly to the employer.'" (*Ibid.*) "'Thus, *a sexual assault by a supervisor, even on a single occasion*, may well be sufficiently severe so as to alter the conditions of employment and give rise to a hostile work environment claim.'" (*Ibid.*, italics added.)

The trial court's finding that Domino's made a sufficient evidentiary showing to support its motion is not supported by the record. We have reviewed Domino's remaining contentions and conclude they will not change the result we have reached.

The judgment is reversed. Costs on appeal are awarded in favor of appellant.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Barbara A. Lane, Judge

Superior Court County of Ventura

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